COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 048099-00**

Jorge Fuentes	Employee
Fries Towing	Employer
Granite State Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Fabricant)

APPEARANCES
John J. Sheehan, Esq., for the employee
John C. White, Esq., for the insurer

HORAN, J. The insurer appeals an administrative judge's decision awarding the employee ongoing § 34 benefits for an October 25, 2000 industrial injury. We affirm the decision.

The employee injured his left major hand working as a truck mechanic. (Dec. 6.) As a result, the employee underwent three surgeries, the last being a tenolysis and PIP joint capsulotomy on his left small finger. (Dec. 7.) The insurer accepted liability for the injury. (Dec. 2-3.)

The insurer filed a request to modify or discontinue the employee's weekly § 34 benefits. At the § 10A conference, the judge discontinued § 34 payments and ordered the insurer to pay § 35 benefits at the maximum rate. The employee appealed. (Dec. 2.)

Prior to the hearing, the impartial physician diagnosed the employee with a crush injury with soft tissue lacerations, fractures of the left ring and small fingers, ankylosed IP joints of the left ring and small fingers, and chronic pain in his left hand/upper extremity. The doctor causally related the diagnoses to the industrial injury, and opined the employee was partially disabled. The impartial physician believed the employee was capable of performing adjusted work, but also felt he was incapable of returning to his former occupation. Although the doctor did not feel that further surgical treatment was

appropriate, he suggested the employee's left hand pain and sensitivity could be addressed by a work hardening and desensitization therapy program. (Dec. 8-9.) The judge adopted the impartial physician's opinion. (Dec. 9.)

The employee, who "is able to speak, read and understand limited English," testified at the hearing with the assistance of a Spanish interpreter. (Dec. 5.) The judge credited testimony from the employee's vocational expert, Paul Blatchford, that unskilled jobs existed in the manufacturing, clothing, and electronics industries, where fluency in English was not required. (Dec. 11.) However, when the judge analyzed the *employee's* ability to obtain and retain remunerative work,[1] he found that:

> [t]he Employee will soon reach 54 years of age, has a sixth grade education in Guatemala, has worked as an auto mechanic consistently since 1979, has not worked since the industrial injury, and has limited ability to communicate in the English language. Moreover, as a result of the industrial injury he does not have the necessary strength of his dominant hand to use tools effectively to perform or retain work as an auto mechanic, the only work of his choice since 1979. The Employee's inability to effectively communicate in English severely limits his workplace interpersonal skills and restricts him from employment in an auto parts store where his work experience might have provided him with possible transferable skills.

(Dec. 14.) The insurer contends the judge performed an inadequate vocational analysis, and that his award of benefits was therefore arbitrary, capricious and contrary to law. Specifically, it maintains that by crediting the impartial medical examiner's testimony (that the employee's medical disability was partial), and by further crediting Mr. Blatchford's testimony (that jobs for partially disabled Spanish speaking unskilled workers are available), the judge's award of § 34 benefits cannot stand. We disagree.

The judge's adoption of the impartial medical examiner's opinion that the employee was partially disabled does not, as a matter of law, preclude a finding of total incapacity. See Scheffler's Case, 419 Mass. 251 (1994). Further, the judge's acknowledgement of work availability concerned the general state of the labor market – it

[1] See Frennier's Case, 318 Mass. 635, 639 (1945).

was not a finding specific to the employee, and it did not require a finding of partial incapacity. Id.

A fair reading of the decision reveals the judge properly made an individualized assessment of the employee's claim by considering his medical condition, pain, work history, age, education, and communication skills before concluding that he remained totally disabled. In short, the judge did his job by conducting a thorough Frennier and Scheffler analysis. See also Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999). The subsidiary findings and the evidence of record adequately support his conclusion.

Accordingly, we affirm the decision of the administrative judge. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,312.21.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: April 4, 2005.